

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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Special Distribution

Committee on Trade in Industrial Products
Working Group 1

COUNTERVAILING DUTIES

Note by the Secretariat

At the June 1973 meeting of Working Group 1, the secretariat was instructed, in order to establish a basis for discussion for future work, to produce a working document designed, in accordance with the scheme proposed by one delegation (COM.IND/W/98, Annex III), to adapt certain provisions of the Anti-Dumping Code to countervailing duties (Spec(73)44, paragraph 15).

A text which adapts the relevant provisions of the Anti-Dumping Code to countervailing duties as suggested in this proposal is attached. The corresponding provisions of the Anti-Dumping Code are indicated for the convenience of delegations.

- (b) (b) The valuation of injury - that is the evaluation of the effects of the subsidized imports on the industry in question - shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of subsidized and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.
- (c) (c) In order to establish whether subsidized imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of unsubsidized imports of the product in question, competition between the domestic producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.
- (d) (d) The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.
- (e) (e) A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidization would cause material injury must be clearly foreseen and imminent.¹

¹One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at subsidized prices.

- (f) (f) With respect to cases where material injury is threatened by subsidized imports, the application of countervailing measures shall be studied and decided with special care.

Art.4

Article 4

Definition of Industry

- (a) (a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that
- (i) when producers are importers of the subsidized product the industry may be interpreted as referring to the rest of the producers;
 - (ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.
- (b) (b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).
- (c) The provisions of Article 3(d) shall be applicable to this Article.

C. Investigation and Administrative Procedures

Art.5

Article 5

Initiation and Subsequent Investigation

- (a) (a) Investigations shall normally be initiated upon a request on behalf of the industry¹ affected, supported by evidence both of subsidization and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both on subsidization and on injury resulting therefrom.
- (b) (b) Upon initiation of an investigation and thereafter, the evidence of both subsidization and injury should be considered simultaneously. In any event the evidence of both subsidization and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the authorities of the exporting country or the exporter and the importer.
- (c) (c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of subsidy or the volume of subsidized imports, actual or potential, or the injury is negligible.
- (d) (d) A countervailing duty proceeding shall not hinder the procedures of customs clearance.

¹As defined in Article 4.

Art.6

Article 6

Evidence

- (a)(f) (a) The foreign government and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the countervailing investigation in question. They shall also have the right, on justification, to present evidence orally. Once the competent authorities are satisfied that there is sufficient evidence to justify initiating a countervailing investigation pursuant to Article 5 representatives of the exporting country and the exporters and importers known to be concerned shall be notified and a public notice may be published.
- (b) (b) The authorities concerned shall provide opportunities for the complainant, the foreign government and all other interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph (d) below, and that is used by the authorities in a countervailing investigation, and to prepare presentations on the basis of this information.
- (c) (c) The investigating government shall be given, by the accused government and all other parties known to be concerned, all reasonable information that is considered relevant to the investigation, including the opportunity of personal discussions with the authorities directly concerned with the subsidy.
- (c) (d) All information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to a countervailing investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it, without specific permission of the party submitting such information.

- (d) (e) However, if the authorities concerned find that a request for confidentiality is not warranted and if the interested party is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.
- (e) (f) In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation.
- (g) (g) Throughout the countervailing investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.
- (h) (h) The authorities concerned shall notify the authorities of the exporting country and the directly interested parties of their decisions regarding imposition or non-imposition of countervailing duties, indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public the decisions.
- (i) (i) The provisions of this Article shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. In cases in which any interested party withholds the necessary information, a final finding, affirmative or negative, may be made on the basis of the facts available.

Art.7

Article 7

Undertakings

- (a) (a) Countervailing duty proceedings may be terminated without imposition of countervailing duties or provisional measures upon receipt of a voluntary undertaking by the authorities of the exporting country to cease granting the subsidy in question.
- (b) (b) If the authorities of the exporting country undertake during the examination of a case, to cease granting the subsidy in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the authorities of the exporting country so desire or the authorities concerned so decide. If a determination of no injury is made, the undertaking given by the authorities of the exporting country shall automatically lapse unless the authorities of the exporting country state that it shall not lapse. The fact that authorities of the exporting country do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the subsidization continues.

D.

D. Countervailing Duties and Provisional Measures

Art.8

Article 8

Imposition and Collection of Countervailing Duties

- (a) (a) The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the countervailing duty to be imposed shall be the full margin of subsidization or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

- (b) (b) When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.
- (c) (c) The amount of the countervailing duty must not exceed the margin of subsidization as established under Article 2. Therefore, if subsequent to the application of the countervailing duty it is found that the duty so collected exceeds the actual subsidization margin, the amount in excess of the margin shall be reimbursed as quickly as possible.
- (e) (d) When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in Article 4(a)(ii), countervailing duties shall only be definitively collected on the products in question consigned for final consumption to that area, except in cases where the authorities of the exporting country shall, prior to the imposition of countervailing duties, be given an opportunity to remove the subsidy in question or to make suitable administrative changes that would remove the effect of the subsidy on the exports to the area concerned. In such cases, if an adequate assurance to this effect is promptly given, countervailing duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area.

Art.9

Article 9

Duration of Countervailing Duties

- (a) (a) A countervailing duty shall remain in force only as long as it is necessary in order to counteract subsidization which is causing injury.
- (b) (b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if the authorities of the exporting country or interested suppliers or importers of the product so requested and submit information substantiating the need for review.

Art.10

Article 10

Provisional Measures

- (a) (a) Provisional measures may be taken only when a preliminary decision has been taken that there is subsidization and when there is sufficient evidence of injury.
- (b) (b) Provisional measures may take the form of a provisional duty or, preferably, a security - by deposit or bond - equal to the amount of the countervailing duty provisionally estimated, being not greater than the provisionally estimated margin of subsidization. Withholding of appraisement is an appropriate provisional measure provided that the normal duty and the estimated amount of the countervailing duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.
- (c) (c) The authorities concerned shall inform representatives of the exporting country and the directly interested parties of their decisions regarding imposition of provisional measures indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public such decisions.
- (d) (d) The imposition of provisional measures shall be limited to as short a period as possible. More specifically, provisional measures shall not be imposed for a period longer than three months or, on decision of the authorities concerned upon request by the authorities of the exporting country or by the exporter and the importer, six months.
- (e) (e) The relevant provisions of Article 8 shall be followed in the application of provisional measures.

Art.11

Article 11

Retroactivity

Countervailing duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

(i) Where a determination of material injury (but not of a threat of material injury, or of a material retardation of the establishment of an industry) is made or where the provisional measures consist of provisional duties and the subsidized imports carried out during the period of their application would, in the absence of these provisional measures, have caused material injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the countervailing duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated as the case may be.

(ii) Where appraisalment is suspended for the product in question for reasons which arose before the initiation of the subsidy case and which are unrelated to the question of subsidization, retroactive assessment of countervailing duties may extend back to a period not more than one hundred and twenty days before the submission of the complaint.

(iii) Where for the subsidized product in question the authorities determine

- (a) either that there is a history of subsidization which caused material injury or that the importer was, or should have been, aware that the exporter was subsidized and that such subsidization would cause material injury, and
- (b) that the material injury is caused by sporadic subsidies (massive subsidized imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess a countervailing duty retroactively on those imports,

the duty may be assessed on products which were entered for consumption not more than ninety days prior to the date of application of provisional measures.

E. E. Countervailing Action on Behalf of a Third Country

Art.12

Article 12

- (a) (a) An application for countervailing action on behalf of a third country shall be made by the authorities of the third country requesting action.
- (b) (b) Such an application shall be supported by information to show that the imports are being subsidized and by detailed information to show that the subsidization is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.
- (c) (c) The authorities of the importing country in considering such an application shall consider the effects of the ~~subsidy~~ on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the subsidy on the industry's exports to the importing country or even on the industry's total exports.
- (d) (d) The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

PART II - FINAL PROVISIONS

Art.13

Article 13

This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to the General Agreement and by the European Economic Community. The Agreement shall enter into force on [.....] for each party which has accepted it by that date. For each party accepting the Agreement after that date, it shall enter into force upon acceptance.

Art.14

Article 14

Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Countervailing Duties Code.

Art.15

Article 15

Each party to this Agreement shall inform the CONTRACTING PARTIES to the General Agreement of any changes in its countervailing laws and regulations and in the administration of such laws and regulations.

Art.16

Article 16

Each party to this Agreement shall report to the CONTRACTING PARTIES annually on the administration of its countervailing laws and regulations, giving summaries of the cases in which countervailing duties have been assessed definitively.

Art.17

Article 17

The parties to this Agreement shall request the CONTRACTING PARTIES to establish a Committee on Countervailing Practices composed of representatives of the parties to this Agreement. The Committee shall normally meet once each year [in conjunction with the meeting of the Committee on Anti-Dumping Practices] for the purpose of affording parties to this Agreement the opportunity of consulting on matters relating to the administration of countervailing systems in any participating country or customs territory as it might affect the operation of the Countervailing Duties Code or the furtherance of its objectives. Such consultations shall be without prejudice to Articles XXII and XXIII of the General Agreement.

This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each contracting party to the General Agreement and to the European Economic Community.

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Geneva this [.....] day of [.....]
one thousand nine hundred and [.....], in a single copy, in
the English and French languages, both texts being authentic.
